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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 ROBIN BAIN,

13 Plaintiff,

14 vs.

15 FILM INDEPENDENT, INC., *et al.*,

16 Defendants.

Case No.: 2:18-cv-04126-PA(JEMx)
Hon. Percy Anderson Presiding

**PLAINTIFF'S SURREPLY IN
OPPOSITION TO DEFENDANT
JESSICA HAID'S MOTION TO
COMPEL ARBITRATION**

**[Supplemental Declaration of Robin
Bain Filed Concurrently Herewith]**

Date: October 15, 2018

Time: 10:00 a.m.

Courtroom: 9A 1st Street Courthouse

1 In her reply in support of the motion to compel arbitration, Haid made at
 2 least two distinct legal arguments concerning equitable estoppel that she had not
 3 raised in the initial motion. Haid argues for the first time in her reply that
 4 Nowhereland Movie, LLC should be treated as an alter ego of Bain, and that Bain
 5 should be deemed a joint employer under *Martinez v. Combs*, 49 Cal.4th 35 (2010)
 6 as modified (June 9, 2010). These arguments should not be weighed by the Court
 7 because “[i]ssues raised for the first time in the reply brief are waived.” *Bazuaye v.*
 8 *INS*, 79 F.3d 118, 120 (9th Cir. 1996). Indeed, it “is improper for a moving party to
 9 introduce new facts or different legal arguments in the reply brief than those
 10 presented in the moving papers.” *United States ex rel. Giles v. Sardie*, 191 F. Supp.
 11 2d 1117, 1127 (C.D. Cal. 2000). Because Haid failed to raise these arguments prior
 12 to her reply, they are waived and should not be considered. To the extent the Court
 13 is inclined to consider these arguments, they fail as discussed in brief below.

14 **1. Nowhereland Movie, LLC is not Bain’s alter ego**

15 Haid bore the burden of asserting its alter ego theory in its pleadings and
 16 establishing alter ego liability in its moving papers. She failed to assert claims of
 17 alter ego in her answer and counterclaim and failed to even reference in her
 18 moving papers an alter ego theory, let alone prove same.

19 In her reply she asserts for the first time this theory, which is fatal. Indeed,
 20 establishing alter ego liability requires weighing the respect given to the entity, the
 21 potential injustice to be suffered by parties if a separate entity is acknowledged,
 22 and purported fraudulent intent of the party who created the entity. *Incorporators*
 23 *Bd. Of Trustees of Mill Cabinet Pension Tr. Fund for N. California v. Valley*
 24 *Cabinet & Mfg. Co.*, 877 F.2d 769, 772 (9th Cir. 1989). These issues are not
 25 adequately addressed by Haid, even in the reply, most likely because the argument
 26 has no merit.

1 The Nowhereland Movie, LLC (“Nowhereland”) was established for the
 2 production of the film *Nowhereland / Girl Lost* (the “Film”) in October of 2014,
 3 pursuant to advice from counsel and consultation with a potential investor for the
 4 Film. Supplemental Declaration of Robin Bain (“Bain Supp. Decl.”) ¶ 1.
 5 Nowhereland was fully capitalized at its inception, and maintained bank accounts
 6 separate and apart from Bain’s personal accounts. Id. Nowhereland itself paid all
 7 cast and crew for their work on the Film. Id. at ¶ 2, Ex. 5. Despite numerous false
 8 assertions to the contrary, Haid was paid by Nowhereland for her work on the Film
 9 – not by Bain. Id. The deposited check for Haid’s work on the film, submitted
 10 herewith, makes this clear. Id.¹ Throughout the production of the Film and
 11 thereafter, Nowhereland was respected as a separate legal entity from Bain herself.

12 And Haid will suffer no injustice if Nowhereland is properly deemed by this
 13 Court to be a separate entity. Indeed, Haid points to no specific injustice that she
 14 would suffer due to that outcome. If Haid were to suggest that recognizing
 15 Nowhereland as a separate entity would preclude Haid from securing any damages
 16 for her claims due to Nowhereland’s financial condition, she has failed to
 17 demonstrate that financial condition, or that Bain individually is any more capable
 18 of paying any potential monetary damages. And, even if Haid had evidence
 19 concerning the entity’s finances, “[t]he inability to collect from an insolvent
 20 defendant does not, by itself, constitute an inequitable result.” *Valley Cabinet &*
 21 *Mfg. Co.*, 877 F.2d at 774 (internal citations omitted), *Seymour v. Hull & Moreland*
 22 *Eng'g*, 605 F.2d 1105, 1113 (9th Cir. 1979).

23
 24
 25
 26 ¹ This check along with the Actor Deal Memo from November 3, 2014, which
 27 Haid signed, make clear that Haid was aware of who her “employer” was well in
 advance of her improper counterclaims.

1 Similarly, Haid fails to point to any specific fraudulent intent in Bain's
 2 creation or use of Nowhereland, suggesting only a vague "fraudulent intent of
 3 limiting her liability." Reply (Dkt. No. 41) at 5. If wishing to limit liability with the
 4 creation of a limited liability company were sufficient to constitute "fraudulent
 5 intent," no such entity would have ever been created without "fraudulent intent."
 6 Bain created Nowhereland to clearly delineate the rights, liabilities, and assets of
 7 that entity as separate from her own. Haid has not and cannot prove that this
 8 constitutes fraudulent intent.

9 Because Nowhereland was given adequate respect as a separate entity, Haid
 10 will suffer no injustice if Nowhereland is treated as a separate entity, and Bain
 11 displayed no fraudulent intent in her creation or use of Nowhereland, that limited
 12 liability company cannot be deemed Bain's alter ego.

13 **2. The *Martinez* tests do not apply**

14 Bain was not Haid's employer – Nowhereland was Haid's employer. Bain
 15 oversaw the production of the film, as is standard in the film industry, as an agent
 16 of Nowhereland, not individually. The wages paid were governed by agreements
 17 with Nowhereland and were paid by Nowhereland. The "*Martinez* tests" cited by
 18 Haid in her reply concern only claims pursuant to the Industrial Welfare
 19 Commission. None of Haid's claims are brought under that wage order, so that test
 20 is entirely inapplicable here.

21 **3. The LA Media Works claims should not be stayed**

22 Defendant LA Media Works filed crossclaims against Haid for falsely
 23 advising LA Media Works that she had the right to distribute and publish portions
 24 of the film at issue. These allegations concern the copyright infringement claims
 25 Bain asserts against LA Media Works and Haid. As discussed in Bain's opposition
 26 to the Motion to Compel Arbitration, Bain's copyright claims do not arise under
 27

the Deal Memos and are therefore not subject to any arbitration provision.² Given that Bain's claims are not subject to arbitration, it would be inappropriate to stay this action as to LA Media Works even if any of Haid's claims proceed to arbitration because the outcome of the non-arbitrable copyright-related claims will not depend on any arbitrator's decision. *Glob. Live Events v. Ja-Tail Enterprises, LLC*, No. CV 13-8293 SVW, 2014 WL 1830998, at *3 (C.D. Cal. May 8, 2014), citing *United Commc'ns Hub, Inc. v. Qwest Commc'ns, Inc.*, 46 F. App'x 412, 415 (9th Cir.2002) (unpublished) (quoting *Simitar Entm't, Inc. v. Silva Entm't, Inc.*, 44 F.Supp.2d 986, 997 (D.Minn.1999)). This action should not be stayed, even if certain claims are ordered to arbitration.

4. Conclusion

In light of the above, and the facts and arguments stated in Bain's opposition, the Court Should deny Haid's motion to compel arbitration.

Respectfully submitted,

Dated: October 4, 2018

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² It should be noted that Haid fails in her reply to address any of the relevant legal authority concerning this issue that Bain provided in her Opposition.